

Statement of

The Honorable Russ Feingold

United States Senator

Wisconsin

September 17, 2008

Senate Judiciary Committee

Hearing on "Oversight of the Federal Bureau of Investigation"

Wednesday, September 17, 2008

Statement of U.S. Senator Russell D. Feingold

This is a particularly important time for this hearing. Last month, the Department of Justice shared with this committee new draft Attorney General guidelines to govern the activities of FBI agents in criminal, national security and foreign intelligence investigations. Such Attorney General guidelines were promulgated for the first time in the mid-1970s to rein in the abuses that came to light through the Church Committee's work, and they already have been revised several times since September 11, 2001. They are a critical component of the system of oversight and checks on FBI authority.

Initially we were told that the Attorney General planned to sign these new draft guidelines into effect just a week after committee staff had been permitted to look at them. However, after the chairman and ranking member of this committee requested a delay to allow more thorough review by members of Congress and the public, and after Senator Kennedy, Senator Durbin, Senator Whitehouse and I made a similar request and raised substantive concerns about the draft guidelines, the Attorney General agreed to delay signature until after today's hearing. I understand that the Justice Department just a few days ago met for the first time with advocacy and community groups and briefly showed them the new draft guidelines. I appreciate those steps, but the Department also has said that it plans to go forward with its original implementation date of October 1, which does not allow much time for consideration of significant changes. The Department still has not made the draft guidelines public, nor has it even allowed committee members or relevant experts to retain copies of the guidelines to review. This is hardly a recipe for meaningful consultation.

Nonetheless, I want to reiterate some of the most significant concerns I have with the draft, as laid out in the letter sent to the Attorney General by myself and my three colleagues on August 20:

While our access to the draft Attorney General Guidelines has been limited, we want to note some of our initial concerns and questions, which highlight the need for additional time and consultation:

? The guidelines permit the FBI to use a variety of intrusive investigative techniques to conduct "assessments" of possible criminal activity, national security threats or foreign intelligence collection - without any initial factual predication. We are concerned about the extent to which such authority might, for example, permit the FBI to conduct long-term physical surveillance of an innocent American citizen; interview such an individual's neighbors and professional colleagues, including based on a "pretext" or misrepresentation; recruit human sources to provide information on that individual; or conduct commercial database searches on that individual - all without any basis for suspicion. Moreover, the mechanisms that the FBI intends to use for approval and oversight of these new investigative tools have not been shared with Congress and yet are critical to understanding how these tools could be employed. We are particularly concerned that the draft guidelines might permit an innocent American to be subjected to such intrusive surveillance based in part on race, ethnicity, national origin, religion, or on protected First Amendment activities.

? The guidelines permit the collection of foreign intelligence information inside the United States, through both "assessments" and predicated "full investigations," with little explicit protection for information gathered about United States persons. The definition of "foreign intelligence" is broad, and covers any information relating to the activities of a foreign government, organization or person. We are concerned about the extent to which the FBI may be permitted to gather or use information about Americans under the rubric of foreign intelligence gathering when there is no suspicion of a crime, threat to national security, or any other wrongdoing.

? The draft guidelines include broad information-sharing provisions with few constraints. While there is no doubt that our intelligence agencies must share important threat information with one another, we have serious questions about the scope of information sharing as it relates to U.S. persons who are under no suspicion of wrongdoing.

In addition to these substantial concerns and questions about the current draft, I see no reason to rush forward with these very significant changes to the guidelines now. Changes to the criminal and national security guidelines have already been made by this administration in the aftermath of September 11, 2001. Given the breadth of these new revisions, the Department and the FBI should consider carefully the input of members of Congress, experts in national security and privacy issues, and affected communities before making any final decisions.

It also would be sensible to allow the next administration - which will take office in a mere four months - to weigh in before making these sweeping changes to the guidelines. It makes little sense to try to implement such a sweeping revision, with the expenditure of resources in training that such implementation will involve, at this time. The next Attorney General should have the opportunity to consider these issues and put into place guidelines to govern the Department, rather than either having to defer to the outgoing Attorney General, or explicitly undo what has been done in the last months of this administration.

I hope the Department and the Bureau will take these reasonable steps.